Derrick & another v Mokua (Civil Appeal E138 of 2023)
[2025] KEHC 19 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KEHC 19 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E138 OF 2023

DKN MAGARE, J

JANUARY 10, 2025

BETWEEN

DAVY MOTARI DERRICK ..... 1ST APPELLANT

DANIEL MOGAKA MAINYE ..... 2ND APPELLANT

AND

FELISTUS MORAA MOKUA ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling and Order of Magistrate Court delivered on 24.8.2023 by Hon. CN. Sindani, in Ogembo PMCC No. E186 of 2022. The court declined to set aside ex parte judgment. The court set aside ex parte judgment in a related matter, being, Ogembo PMCC No. E186 of 2022.

2. The Appellant filed this Appeal and preferred the following material grounds in the Memorandum of Appeal dated 7th August 2023.

    a. The Trial Court erred in law and fact in disallowing the Appellant's Application dated 3.4.2023 when he had allowed a similar Application in Ogembo PMCC No. E187 of 2022.

    b. The Trial Court erred in law and fact in dismissing the Applicant's Application and allowing execution that was prejudicial to the Appellant.

    c. The Trial Court erred in law and fact in failing to find the Respondent culpable of not serving the Respondent in good time.

3. The impugned Ruling arose from an application dated 3.4. 2023 that sought to set aside the Interlocutory Judgment in Ogembo PMCC No. E186 of 2022. The Grounds of the Application were that the Appellants were not properly served with the summons to enter appearance. It was also contended that the Appellants were condemned without a hearing having not been served with the summons to enter appearance.

4. The Respondent opposed the Application through the Replying affidavit principally on the ground that there was proper service of the summons. It was also contented that the learned magistrate correctly established that whereas the draft defence in Ogembo PMCC No. E187 of 2022 raised triable issues, there was no demonstrable triable issue raised in Ogembo PMCC No. E186 of 2022.

Submissions

5. The Appellant filed submissions dated 12.9.2024 in which it was submitted that court erred in finding proper service of summons when there was none. Reliance was placed on Order 5 Rule 5 of the Civil Procedure Rules to canvas the argument that summons ought to have been issued to the Appellants calling them to enter appearance and file defence. It was the case of the Appellants that the summons in this case was served to a person other than the Appellants as evidenced by the different mobile phone numbers used.

6. It was submitted that the default judgement was irregular and ought to be set aside. The Appellants relied on the case of James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another (2016)e KLR to submit that the Appellants were entitled to leave to defend the suit. The Appellant urged this court to apply its discretion to allow the Appeal and set aside the default judgement. They relied on John Peter Kiria & Another vrs Pauline Gakwiria (2013)e KLR to submit that no party should be shut out of presenting its defence.

7. On the part of the Respondent, submissions dated 10.9.2024 were filed in which it was submitted that the court was correct in dismissing the Application since there was evidence that the summons to enter appearance was properly served following which the Appellant failed to enter appearance or file Defence within the stipulated time. The Respondent also submitted that in Ogembo PMCC No. E187 of 2022, the lower court correctly appreciated that there was a meritorious defence while in Ogembo PMCC No. E186 of 2022 there was no meritorious defence.

8. Further, it was submitted for the Respondent that the Appellants never requested even to cross examine the process server on the contents of the affidavit of service that proved the service of the summons.

Analysis

9. This being a first appeal, the court should re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. In the case of Mbogo and Another vs. Shah [1968] EA 93 the court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

10. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the judges in their usual gusto, held as follows; -

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular

circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

11. Having proceeded by way of affidavits, this court has latitude in these matters. In the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR), Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

12. The issue that falls for this Court's determination is whether the lower court erred in dismissing the Appellant's Application dated 3.4. 2023 that sought to set aside the interlocutory Judgment in Ogembo PMCC No. E186 of 2022. The court is also alive to the fact that the lower court exercised an act of discretion in declining the Appellants' Application. In the case of and this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

13. The matter turns on interpreting the fidelity of the affidavit of service. It is noteworthy that observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

14. The court has to reevaluate the procedure followed towards establishing validity of service of the summons to enter appearance. I agree with the holding of the Supreme Court of India which stated in Sangram Singh vs. Election Tribunal, Koteh, AIR 1955 SC 664, at 711 cited in the case of Gerita Nasipondi Bukunya & 2 others v Attorney General [2019] eKLR that:

> " [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their

lives and property should not continue in their absence and that they should not be precluded from participating in them."

15. The Court exercises its discretion in allowing or rejecting Setting aside ex parte Judgement. When ex parte Judgement is set aside, it allows a Defendant an opportunity to be heard. On the other hand, a defendant who has spurned being heard, should be driven off the seat of complacence. Before driving out a party out of the seat of justice, the court must be satisfied that a great injustice will not be occasioned by not allowing parties to be heard. The court of appeal in CMC Holdings Ltd vs. Nzioki [2004] KLR 173 stated as forth

> " In an application for setting aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle."

16. The Application by the Appellants which was based on the grounds that the Judgement was entered without proper service when there was a meritorious Defence. In Wachira Karani vs. Bildad Wachira (2016) eKLR as was quoted in the case of David Gicheru v Gicheha Farms Limited & another [2020] eKLR the Court held that:-

> " The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

17. As I have already observed, setting aside an ex parte Judgment is an exercise of judicial discretion. Judicial discretion is unfettered. However, it must be exercised in accordance with the law. The rules of procedure bespeak the path to substantive justice. I note that the court process server who served the impugned Affidavit to confirm personal service was not cross examined by the Appellants. The Respondent's case on this is that it is the Appellants who did not apply to cross examine the process server. Ojwang, J (as he then was) in Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others [2004] eKLR held as doth:

> " The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure."

18. Unless and until the court has pronounced a judgement upon hearing parties on the merits or by consent, when Judgement has been obtained only by a failure to follow or adhere to any of the rules of procedure, the court has the primary duty of balancing the prejudice of setting aside ex parte judgement with the supremacy of the right to be heard. I am also persuaded by the reasoning of Odunga J, (as he then was) in as Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR.

> 28. In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective

merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication.

The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.

19. One aspect of this case that disturbs the court is the nature of service. Service is supposed to be carried out in compliance with the law. The affidavit of service has to comply with Order 5, rule 15(1) of the Civil Procedure Rules in order to count as evidence of service. It provides as thus:

> The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.

20. It is true that a process server is to be cross examined where there is doubt. In this case the affidavit of service is bogus. It falls short of the affidavit of service. There is nothing showing who identified the Appellants for service. This is more crucial, where one of the parties is deceased. The description of the parties are important. Service upon the insurance is good service, but for the insurance. It is not party to the suit. The affidavit is otiose vis-à-vis service as only parties involved in identifying the Appellants needed to swear an affidavit. I am not satisfied that there was proper service. Without proper service the court was obligated as a matter of right to allow the application.

21. Overall, what I understand the Appellants to submit is that a different person was served and not the Appellants. In my view, the Respondent did not satisfy the procedure as anticipated on the service of the summons to enter appearance. In Pindoria Construction Ltd vs. Ironmongers Sanytaryware Civil Appeal No. 16 of 1976 it was held that:

> "It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

22. Considering all factors of this case, I am of the view that the lower court erred in dismissing the application to set aside default judgement in Ogembo PMCC No. E186 of 2022 while allowing a similar Application in Ogembo PMCC No. E 187 of 2022. The subject accident occurred out of the

same course of action and the court could not find a triable defence in one and none in the other case as the issues were the same.

23. What constitutes a triable issue was elucidated well in the case of Patel vs. E.A Cargo Handling Services Ltd (1974) EA 75 at p.76 Duffus P. to be an issue which raises a prima facie defence and which should go to trial for adjudication. I have perused the draft defence. It is not an idle one. Even where the Respondent was a passenger, it does not rule out the issue of liability and involvement or even addition of a third party. The court cannot base its decision of exparte proceedings already undertaken.

24. The question whether, the appellants raised a proper defence is superfluous and is only useful where there is proper service. I understand the Respondent to maintain the position that the Defence filed under Ogembo PMCC No. E186 of 2022 subject of this Appeal had no triable issues as found the lower court. A triable issue, however, was not an issue that must succeed. In Five Forty Aviation limited v Tradewinds Aviation Services Limited [2015] eKLR where the Court of Appeal, citing its previous decisions stated as follows:-

> "We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel v E.A. Cargo Handling Services Ltd [1974] E.A. 75 at page 76 Duffus P. said: "In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

25. The ex parte judgment must therefore be set aside ex debito justiceae as a matter of right. Where there is a right to defend, then the court cannot look at the defence. In Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others [2019] eKLR, the court of Appeal posited as doth:

> 24. In our view, the factors which the Judge took into account are undoubtedly relevant matters for consideration in an application to set aside an ex parte judgment with which the court was dealing. We are fully in agreement with the Judge when he expressed:
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> > "The request for the default judgement was premature, irregular and overtly untenable. Where such facts present themselves to court, the court has no discretion to exercise. It can only answer to the principle of law that nothing put on a nullity can stand. The court has a duty to set aside the judgement as a matter of right and ex debito justitiae."
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> 25. The position taken by the Judge is consistent with the decision of this Court in the case of James Kanyiita Nderitu & another vs. Marios Philotas Ghikas & another [2016] eKLR on which the Judge relied to the effect that once it comes to the notice of the court that a judgment is irregular, the court does not have to be moved to set it aside. It can do so suo motto without venturing into considerations whether the intended defence raises triable issues or whether there was delay in applying to set aside the irregular judgment.

26. It is more poignant that the second Appellant was deceased. There is no indication on where he was served. The court is entitled to set aside such irregular judgment, even suo motto. In the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR, the court of Appeal[Makhandia, Ouko & M'Inoti, JJ.A] posited as doth:

> The former Court of Appeal for Eastern Africa, in Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court,

ex debito justitiae, from setting aside such an order. Briggs, JA., with whom Worley P. and Sinclair, VP. concurred, stated thus:

> " On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before its can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae, and that in cases of nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR"

27. The upshot of the foregoing is that I am satisfied that the Appellants, in particular the first Appellant has a right to defend himself. Judgment having been entered against the deceased without service, the judgment against the second Appellant is a nullity. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

28. In the circumstance I find merit in the Appeal and is accordingly, allowed. The issue of costs is governed by Section 27 of the *Civil procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

29. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is

> eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

30. No-one can begrudge a successful party from getting costs. The 1st Appellant shall have costs of Ksh 45,000/=.

Determination

31. In the end, I make the following orders in the interest of justice:

    i. The Appeal is allowed. The interlocutory Judgement in Ogembo PMCC No. E186 of 2022 and all consequential orders are set aside, as a matter of right as there was no proper service on the Appellants.

    ii. The Respondent to extend summons and serve upon the Advocate of the 1st Appellant who shall file defence within 15 days of service.

    iii. Judgment against the Daniel Mogaka Mainye (deceased) is a nullity since the 2nd Appellant is deceased. No proceedings against Daniel Mogaka Mainye (deceased) shall be undertaken unless and until the law related to suits against deceased persons is complied with.

    iv. The 1st Appellant shall have the costs of the Appeal assessed at Kshs. 45,000/= payable within 30 days, in default execution do issue.

DELIVERED, DATED AND SIGNED AT KISII, VIRTUALLY ON THIS 10TH DAY OF JANUARY 2025. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

M/s Mose, Mose & Mose advocates for the Appellant

M/s Ooga and company advocates for the Respondent

Court Assistant – Kiptum